all over again with possibly different results (see **Supreme Court Practice, 1991,** para 15/6/7, p. 193).

Alternatively, I am of the considered view that Salleh bin Ani ought to be joined as a party as his presence is necessary to ensure that all matters in dispute may be effectually and completely determined and adjudicated upon. Only Salleh bin Ani knew what happened that night when he drove the "sleeping plaintiff" in motorlorry KY 9492.

Accordingly, I order that Salleh bin Ani be joined as a co-defendant and the plaintiff to amend the title to his writ by incorporating Salleh bin Ani as one of the defendants. Costs in the cause to the defendants.

Order accordingly.

BBMB KEWANGAN BERHAD

v.

THANGAVELU PROPERTIES SDN BHD & ANOR

HIGH COURT, KUALA LUMPUR
DATO' HJ. ABDUL MALEK BIN HJ. AHMAD J.
[CIVIL SUIT NO D5-22-1365-91]
28 APRIL 1994

PRACTICE & PROCEDURE: Application for summary judgment - Whether there was a defence on the merits - Delay in making application for summary judgment - Whether delay was inordinate and inexcusable.

The plaintiff had, by a letter of offer dated 22 December 1984, granted loans to the second defendant which loans were secured by legal charges in the name of the first defendant. Upon the defendants default in making repayments, the relevant lands were sold by private treaty. The defendants subsequently signed an undertaking to pay the balance sum owing with interest at 16.5% per annum but had again defaulted and the plaintiffs sought to enter summary judgment.

The defendants argued that the undertaking was bad in law as it had curbed their rights and further contended that the interest could not be claimed as it had already been calculated before the sale of the property. Learned Counsel for the defendants also raised the question of unexplained delay in filing the application for summary judgment.

Held:

[1] The undertaking was quite in order having been entered into after the sale by private treaty of the charged properties and the defendants were well aware that they were only liable to pay for the balance due at the interest rate agreed to by them which was in fact less than the interest rate of 18% specified in the charges. The undertaking was at most a restatement of the defendants liabilities. Even if the undertaking was held to be void in view of s. 29 of the Contracts Act 1950, the liability of the defendants for the balance outstanding had not been altered without it.

[2] In the circumstances of the case, the delay in filing the application for summary judgment

was not inordinate and was well explained by the plaintiff.

[Plaintiff's application allowed with costs].

Cases referred to:
MBf Finance Berhad v. Hasmat Properties Sdn Bhd & 3 Ors [1990] 1 CLJ 106 ***(refd)***
Public Bank Bhd v. Malamaju Enterprise Sdn Bhd & Ors [1989] 2 MLJ 112 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 29
Rules of the High Court 1980, O. 18 r. 19

For the plaintiff - P.T. Lee; M/s Amin-Tan & Co.
For the defendants - Maikal Yasu; M/s Maikal Yasu & Co.

JUDGMENT

Hj. Abdul Malek bin Hj. Ahmad J:
At the previous hearing on 26 January 1994, learned Counsel for the plaintiff had withdrawn their alternative prayer under O. 18 r. 19 of the Rules of the High Court 1980 as they had decided to proceed only on their application for summary judgment. Learned Counsel for the defendants had not raised any objections to this withdrawal but had objected to the substitution of the plaintiff based on their application by *exparte* summons in chambers filed on 20 April 1992. He argued that although the order was granted on 26 May 1992, it had yet to be extracted and as such, his contention was that the title to the suit had not been perfected yet and the plaintiff cannot proceed as the original plaintiff had been wound up and was no longer an entity.

Learned Counsel for the plaintiff had protested against this objection in view of the lack of notice but had explained that the order had in fact been extracted on 24 June 1992. It was then only discovered that the defendants had not been served with the order. In the circumstances, I had overruled the preliminary objection.

At the subsequent hearing, learned Counsel for the plaintiff had enunciated that their claim was based on two loans, for RM350,000 on 22 September 1982 and for RM200,000 on 23 January 1985, given to the second defendant and secured by legal charges in the name of the first defendant. The relevant letter of offer was dated 22 December 1984.

Both the defendants had subsequently defaulted in their payments and the relevant lands were sold by private treaty on 30 July 1990 for RM330,000. The order for sale had in fact been made on 20 June 1987. The defendants had subsequently signed an undertaking on 7 November 1990 to pay the balance with interest at 16.5 percent per annum but had again defaulted and the plaintiff had then sent separate letters of demand to both defendants on 31 May 1991 for RM1,144,466.36, as at 19 May 1991, but the defendants had still failed to pay. Thus the application for summary judgment.

Learned Counsel for the defendants had argued that the defendants' undertaking was bad in law as it had curbed their rights and that the interest cannot be claimed as it had already been calculated before the sale of the property pursuant to the guidelines from Bank Negara. He reiterated that only 8 per cent and not 16.5 percent can be imposed after the order for sale. I found this argument totally devoid of merit as the undertaking was quite in order having been entered into after the sale by private treaty of the charged properties and the defendants were well aware that they were only liable to pay for the balance due at the interest rate agreed to by them which was in fact less than the interest rate of 18 percent specified in the charges. The undertaking was at the most a restatement of their liabilities. The position would have still been the same if the undertaking had not been entered into except that the interest rate would have been 18 percent. They should have objected to it then if they had not agreed to the terms and conditions stated in the undertaking. Even if the undertaking was held to be void in view of s. 29 of the Contracts Act 1950, the liability of the defendants for the balance had not been altered without it. No Bank Negara guidelines had been produced to support learned Counsel's contention of the exorbitant interest. As for the argument that only the first defendant had signed the undertaking, that is not quite correct as the second defendant had also signed it.

Learned Counsel for the defendants had also raised the question of unexplained delay in filing the application as the writ was dated 15 October 1991 but the application had been filed on 16 January 1993 and that the plaintiff had only applied to substitute themselves after the defendants had filed their application to strike out the writ on 30 January 1992.

Learned Counsel for the plaintiff had replied that the first and second defendants had

entered their appearance on 7 November 1991 and 24 January 1992 respectively and the application to substitute the plaintiff had been filed on 20 April 1992 and heard on 26 May 1992. The plaintiff also did not have a proper branch manager until July 1992. I had dealt on this issue quite extensively in *MBf Finance Berhad v. Hasmat Properties Sdn Bhd & 3 Ors* [1990] 1 CLJ 106 and *Public Bank Bhd. v. Malamaju Enterprise Sdn Bhd & Ors* [1989] 2 MLJ 112 and was of the view that the delay here is not inordinate and well explained.

Since there were no issues to be tried, I had granted the plaintiff's application for summary judgment against the defendants for RM1,144,466.36 and interest at 16.5 per cent per annum from 20 May 1991 until full settlement and costs.

BEE YA HOCK @ BEH AH HOCK

v.

TIMBALAN MENTERI HAL EHWAL DALAM NEGERI MALAYSIA & 3 ORS. AND ANOTHER CASE

HIGH COURT, TAIPING
DATO' HAJI ABDUL MALIK BIN HAJI ISHAK JC
[ORIGINATING SUMMONS NO. 24-170-93(T) & 24-175-93(T)
11 MAY 1994

PREVENTIVE DETENTION: Deprivation of liberty - restricted residence order - Copies of orders issued by Deputy Minister of Home Affairs served on plaintiff - Whether in compliance with s. 3(i) of Restricted Residence Act 1933 - Question of certified true copy - Terms of order - Whether prison officer had informed the plaintiff - Place of residence - Whether plaintiff was given a chance to state place he desires in future to reside - Meaning of the word "shall" in the context of s. 3(i) of the Act.

In this case, by consent both the two applications were heard together for an *habeas corpus*. The main issue in this case, is, whether the orders issued by the Deputy Minister of Home Affairs pursuant to s. 2(ii) and 2A of the Restricted Residence Act 1933 and served on the plaintiffs were valid and the requirements of the provisions were complied.

Held:

[1] There has been a serious breach of the mandatory requirements of s. 3(i) of the Restricted Residence Act 1933, the effect of which is to render the restriction orders null and void.

[2] As the breach of a mandatory requirement can never be a trifling matter, it struck at the very core of the matter.

[Plaintiffs ordered to be released forthwith].

Cases referred to:

Lee Weng Kin v. Menteri Hal Ehwal Dalam Negeri Malaysia & 3 Ors. [1991] 2 CLJ 1301 SC ***(foll)***

M/s Hindustan Construction Co. Ltd. v. The Union of India (AIR) [1967] SC 526 ***(cit)***

Union of India v. Nirmal Singh [1987] AIR Allahabad 83 ***(cit)***

Patel Maganbhai Bapujibhai & Ors. v. Patel Ishwarbhai Motibhai & Ors. [1984] AIR Gujarat 69 ***(cit)***

Makhan Lal Sen Gupta v. The State [1958] AIR Calcutta 517 ***(foll)***